No. SC 84622

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL. LISA PROCTOR

Relator,

vs.

THE HONORABLE LARRY BRYSON, ASSOCIATE CIRCUIT JUDGE OF THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI, DIVISION 5,

Respondent.

WRIT OF PROHIBITION REGARDING BOONE COUNTY CASE NO: 02CR164618

BRIEF FOR RESPONDENT

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JURISDICTIONAL STATEMENT

Respondent submits that the writ of prohibition is not a proper remedy in this case. Although Respondent recognizes that no interlocutory appeal lies from the trial court's order of a mental examination, it does not follow that the extraordinary writ of prohibition is an appropriate remedy. As a general rule "if the [lower] court is entitled to exercise discretion in the matter before it, a writ of prohibition cannot prevent or control the manner of its exercise, so long as the exercise is within the jurisdiction of the court." *Card and Freed*, MO. Pract., Appellate Practice, Extraordinary Writs, Section 12.4 at 492 (2d ed. 2001). See, ***State ex rel. K-Mart Corp. v. Holliger***, 986 S.W.2d 165 (Mo. banc 1999) quoted with approval in ***State ex rel. Kinder v. McShane***, decided 10/22/02, SC 84082, slip opinion at 3 (prohibition was not an appropriate remedy because of discretion vested in the trial court). As the Missouri Court of Appeals, Western District, has recently ruled, "the trial court's ruling on the competency of a defendant is a factual determination which must be upheld unless there is no substantial evidence to support it." ***State v. Elam***, Mo. Ct. App, W.D., decided May 21, 2002, WD59349, 2002 WL 1011981 (Mo. App. W.D.), at slip opinion at 3, cause ordered transferred to the Missouri Supreme Court (August 27, 2002). See also,

State v. Freyzell, 958 S.W. 2d 101, 104 (Mo. App. W.D. 1998) (holding that the trial court did not err in finding that defendant was competent because a "trial court's determination of competency is one of fact.")

In the 1970's this Court recognized the obligation of a magistrate to "inquire" of the mental fitness of a defendant before a preliminary hearing. In ***State ex.rel. Vaughn v. Morgett***, 526 S.W.2d 434, 437-438 (Mo. App, KCD 1975), the court ruled as follows in addressing the question of whether the magistrate had jurisdiction to order a mental examination before the preliminary hearing:

> Only a tortured construction of the statutory language of Section 552.020, supra, done at the expense of abrogating basic constitutional rights of an accused, could dictate a holding that a magistrate lacks jurisdiction to inquire into an accused's mental fitness at the preliminary hearing stage. The language employed in Section 552.020, supra, contains no indication that the legislature intended to limit the right to inquire into the mental fitness of an accused to proceed in a felony prosecution to the court having jurisdiction to try, convict and sentence him. To the contrary, the language employed evinces a legislative intent to vest an examining magistrate at the preliminary hearing stage with jurisdiction to inquire into an accused's mental fitness to proceed, as well as the judge of the circuit court after a felony information has been filed . . . . If an accused be both mentally unfit to proceed and innocent, justice is delayed if inquiry into his mental fitness to proceed is deferred until after he is bound over to the circuit court and an

> information has been filed . . . . This court pointedly emphasizes that such a conclusion [that the magistrate has jurisdiction to order the mental exam] in no way transgresses upon respondent's discretionary power to determine whether or not he "has reasonable cause to believe that [relator] has a
>
> mental disease or defect excluding fitness to proceed." **Such is a discretionary matter for respondent alone to determine and this court has no right or authority to dictate how respondent shall exercise his discretion . . . .**" (emphasis added).

Contrary to the holding in ***Vaughn***, Relator wants this Court to ignore the discretion vested in Respondent by the statute, and the federal and state constitutions, and to make a factual determination properly vested in the trial court. Respondent asks this Court to quash the preliminary writ of prohibition because the writ is directed at the exercise of Respondent's discretion, contrary to the express language of the appellate court in ***Vaughn***, *supra*.

On June 4, 2002, a petition for a Writ of Prohibition was filed by Relator with the Missouri Court of Appeals, Western District. On June 5, a Preliminary Writ of Prohibition was issued, ordering Respondent to cease all activity on the case and ordering Respondent to file an answer by June 17. On June 17, an answer was filed. On June 19, a Reply to Respondent's Answer and Suggestions in Opposition was filed. On June 28, the Court of Appeals denied Relator's petition for Writ of Prohibition in an order signed by Judge Robert G. Ulrich and concurred in by Judge Lisa White Hardwick.

On July 16, 2002 Relator filed her petition for Writ of Prohibition with this Court. On August 27, the preliminary writ was issued; and on September 25, 2002, Respondent filed his answer with attached suggestions in opposition.

STATEMENT OF FACTS

On February 6, 2002, the State filed an information charging Ms. Proctor, Relator, with the Class A Misdemeanor of Harassment. (Respondent's Supplement to Return to Preliminary Writ, hereinafter Ret. Supp. 1, 3) Specifically, the State charged that Relator, for the purpose of frightening Ed Baker, communicated by telephone to Ed Baker a threat to commit a felony, an assault, by a threat to physically harm him. (A-8) After a finding that Relator was a danger to herself or the community, a warrant was ordered to issue upon the request of the State. (Ret. Supp. 1, 3) On February 13, 2002, a bond was set at $500 with the condition that Relator have no contact with the victim, Ed Baker. (Ret. Supp. 1, 3) On March 1, 2002, Realtor was advised of the charges against her on a video appearance, and the court ordered a bond investigation to be performed by court services. (Ret. Supp. 1, 3)

On March 19, 2002, Amy O'Keefe of the Boone County Public Defender entered her appearance for Relator. (Ret. Supp. 1, 4) On April 9, Relator and her attorney appeared before the associate circuit judge of Division V, the Respondent, and requested a continuance for further discovery. (Ret. Supp. 1, 4) Relator was released from jail on April 13, 2002, after a bond was posted by A-1Lucky Bonding Inc. (Ret. Supp. 1, 4)

On April 23, 2002, Assistant Prosecutor Deborah Daniels filed a motion requesting an order for a psychiatric evaluation of Relator pursuant to Sections 552.020 and 552.030, RSMo 2000[1]. (Ret. Supp. 13-15). The grounds listed in the State's Motion include facts such as: The Public Administrator of Boone County had been appointed as Relator's Conservator, and "in the pending criminal case, law enforcement described defendant as being very agitated, in a nervous state, quick speech, very loud, and verbally abusive." (L. F. 13) Four days later, Respondent entered an order granting the state's request for a mental exam. (Ret. Supp. 19)

On May 7, 2002, Relator filed a request for a hearing on the State's motion. (Ret. Supp. 20) In the Relator's motion for a hearing, defense counsel advised the court that "Defendant was not on medication at the time Defense Counsel spoke with her," and "Defendant has since taken her medication, and it has improved her ability to effectively assist Defense Counsel." (Ret. Supp. 20).

On May 29, 2002, Respondent heard arguments from counsel with Relator present. (Ret. Supp. 2, 4)[2] The Respondent then granted the state's motion for an examination.

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1 All statutory references are to RSMo 2000, unless otherwise indicated.

2 In the petition and answer, the "evidence" before the Respondent before his ruling on the motion for the mental examination was disputed. In the Relator's Statement of Facts she argues that "No evidence, except the hearsay statements of law enforcement officers as retold by the State in her Motion, was offered." (Relator's Brief at 9) This was not a fact as demonstrated by the pleadings. Respondent also notes the obligation of counsel under Rule 84.04 to draft a

Relator filed a Petition for a Writ of Prohibition in the Court of Appeals for the Western District on June 4, 2002. (Ret. Supp. 5) After the writ was denied by the Court of Appeals, this proceeding followed.

POINTS RELIED ON

I. Respondent Bryson as the trial judge did not abuse his discretion in ordering a mental examination under Chapter 552, RSMo of Lisa Proctor, because the judge had "reasonable cause to believe that the accused lack[ed] mental capacity to proceed," in that (1) the judge had the statements made by law enforcement under oath in the probable cause statement, (2) the judge knew from the records of the Circuit Court of Boone County that a conservator had been appointed for Ms. Proctor, (3) the judge knew from the bond investigation report that Ms. Proctor had been receiving disability payments for two (2) years because of a "mental condition," (4) the judge knew from defense counsel's statement that Ms. Proctor had trouble communicating without her medicine, and (5) the judge had the opportunity to observe Ms. Proctor in court.

State ex rel. Vaughn v. Morgett, 526 S.W. 2d 434 (Mo. App. KCD 1975).

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statement of facts that is a "fair and concise statement of the facts relevant to the questions presented for determination without argument."

Bannister v. State, 726 S.W. 2d 821 (Mo. App. S.D. 1987).

Branscomb v. Norris, 47 F.3d 258 (8th Cir. 1994).

Section 552.020, RSMo 2000.

II. Respondent Bryson's order of a mental examination under Chapter 552 was not an exercise of "extra-jurisdictional power," because a person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect she was incapable of knowing and appreciating the nature, quality, or wrongfulness of her conduct (Section 552.030, RSMo and Section 562.086, RSMo), in that to be guilty of the crime of harassment Ms. Proctor had to have had the purpose to frighten the victim when she communicated to him the threat to assaulthim.

J. B. Vending Co. v. Director of Revenue, 54 S.W. 3d 183 (Mo. banc 2001).

Budding v. SSM Healthcare System, 19 S.W. 3d 678 (Mo. banc 2000).

United States v. Reifsteck, 535 F.2d 1030 (8th Cir. 1976).

Section 552.020, RSMo 2000.

Section 552.030, RSMo 2000.

Section 562.084, RSMo 2000.

III. Respondent Bryson's order does not cause "irreparable harm" to Ms. Proctor, because any statements made by Ms. Proctor during an examination under Chapter 552 are not admissible against her on the issue of guilt, in that Section 552.020.14, RSMo mandates that such statements be excluded and case law, based on the statute and the constitution, recognizes the inadmissibility of such statements.

Penry v. Johnson, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed. 2d 9 (2001)

United States v. Hinckley, 525 F. Supp. 1342 (D.C. 1981)

Section 552.020.14, RSMo 2000.

MAI-CR 3d 306.04

ARGUMENT

I. Respondent Bryson as the trial judge did not abuse his discretion in ordering a mental examination under Chapter 552, RSMo of Lisa Proctor, because the judge had "reasonable cause to believe that the accused lack[ed] mental capacity to proceed", in that (1) the judge had the statements made by law enforcement under oath in the probable cause statement, (2) the judge knew from the records of the Circuit Court of Boone County that a conservator had been appointed for Ms. Proctor, (3) the judge knew from the bond investigation report that Ms. Proctor had been receiving disability payments for two (2) years because of a "mental condition", (4) the judge knew from defense counsel's statement that Ms. Proctor had trouble communicating without her medicine, and (5) the judge had the opportunity to observe Ms. Proctor in court.

Section 552.020.2, (A 12) provides that the trial judge is to "by order of record" appoint qualified experts to examine the accused if there is reasonable cause to believe that defendant "lacks mental fitness to proceed." The statute

never mandates that a hearing be held. The statute never mandates that witnesses be sworn. The statute never mandates the type of evidence that must be received by the court before an order is entered. The statute never mandates that the hearing

must be "on the record" before an examination is ordered. By the clear wording of the statute, and court interpretation, the trial judge is vested with discretion in determining whether the defendant should be examined.

In ***Bannister v. State***, 726 S.W.2d 821 (Mo. App. S.D. 1987), the appellate court reviewed the standard for ordering a Chapter 552 examination. The court reasoned as follows:

> [9, 10] Chapter 552, RSMo Supp. 1983, provided for two types of pretrial, court-ordered psychiatric examination. Section 552.020.2 required a psychiatric examination if the trial court had reasonable cause to believe that the defendant had a mental disease or defect excluding fitness to proceed. Our trial courts have been quite liberal in ordering a psychiatric examination to determine the fitness of the defendant to proceed, *State v. Strubberg*, 616 S.W. 2d 809, 813 (Mo. banc 1981), but they are required to enter an order for a fitness hearing only upon the appearance of reasonable cause to believe the defendant has a mental disease or defect excluding fitness to proceed. *State v. Rider*, 664 S.W.2d 617 (Mo. App. 1984). The results of this examination may be used to reduce the degree of the accused's criminal responsibility, but not to excuse him entirely. *State v. Strubberg*, 616 S.W.2d at 816.

Id. at 828.[3]

The "liberal" interpretation of a Chapter 552 examination is favored by the federal courts too. See, ***Drope v. Missouri***, 420 U.S. 162 (1974). In ***Drope***, the United States Supreme Court noted that "resolution of the issue of competence to stand trial at an early date best serves both the interests of fairness and of sound judicial administration." *Id*. at 178. The Supreme Court continued by noting the following practice in Missouri: "Realization of those facts {the interests of fairness and judicial administration} may have prompted the practice, noted by the sentencing court {in Missouri} 'of the Circuit Attorney at the time to consent in all cases to a psychiatric examination whether with or without merit and without looking into the matter further.'" *Id*.

Following ***Drope***, the Eighth Circuit considered the question of when a trial court must *sua sponte*, and without request from either party, hold a competency hearing. In ***Branscomb v. Norris***, 47 F.3d 258 (8th Cir. 1994), the Eighth Circuit ruled as follows:

> [3][4][5][6][7] Due process requires the trial court to hold a competency hearing *sua sponte* whenever evidence raises a sufficient doubt about the accused's mental competency to stand trial. *Griffin v. Lockhart*, 935 F.2d 926, 929 (8th Cir. 1991). While we can describe no precise quantum of proof

[3] In ***State v. Strubberg***. 616 S.W.2d 809 (Mo. banc 1981) the Missouri Supreme Court noted that Chapter 552 was different than the Model Penal Code, which recognized only one mental examination. Id. at 813-814. In ***State v. Roberts***, 948 S.W.2d 577 (Mo. banc 1997) the Supreme Court distinguishes ***Strubberg***. Neither case addresses the power of the trial judge, when necessary, to order a 552 examination.

> necessary to establish "sufficient doubt," the trial court should consider evidence of irrational behavior by the accused, the accused's demeanor, and any prior medical opinion as to the mental competency of the accused to stand trial. *Id*. at 930.
>
> Additionally, the trial court may consider an express doubt by the accused's attorney, but such doubt alone is not enough to establish sufficient doubt. *Id*. The habeas petitioner has the burden to prove that objective facts known to the trial court raised a sufficient doubt to require a competency hearing. *Id*. We ask whether a reasonable judge, in the same situation as the trial court, should have experienced doubt about the accused's competency to stand trial.
>
> *Id*. at 261.

In this case, the trial judge had the following information to support his "order of record" that he had "reasonable cause" to believe that an expert should be appointed to examine the Relator. Respondent had the statements made by a law enforcement officer under oath and with the officer's declaration that he understood that false statements may be subject to penalty. These statements under oath that Ms. Proctor had "left items at the victims residence in the past, including candy items and magazine cut-outs of models that have likenesses" of the victim's wife. (Ret. Supp. 9) (A-8) In November of 2001, law enforcement had told Ms. Proctor to stop "harassing" the CEO of Holiday Inn Select and to not be on the premises of the Holiday Inn Select or have any contact with the employees of the hotel. (Ret. Supp. 9) (A 8) Upon speaking with the officer, Ms. Proctor became "very loud and hostile" and "threatened to spit in the officer's face." (Ret. Supp. 9) (A-8) A second officer had to respond to help the original

officer with the misdemeanor arrest. (Ret. Supp. 9) (A-8) Despite the warnings and contact with law enforcement, Ms. Proctor continued to call the victim's home and left messages on the victim's voice mail. Based on his personal knowledge, the officer stated under oath in the probable cause statement that Ms. Proctor was a "danger to the crime victim." (Ret. Supp. 9) (A-8)

In addition to the officer's statements made under oath, the trial judge could have taken judicial notice of the court files of the Boone County Circuit Court. In examining these records, Respondent would have learned that in case number 01PR164398 a hearing had been held in 2001, a conservator had been appointed, and a judgment of disability had been entered. (Ret. Supp. 13) (A-4)

In addition to the officer's statements made under oath and the records of the probate proceedings, the Respondent had the report of a court services officer filed after the bond investigation was ordered. In this report, the court services officer wrote as follows: "Proctor stated that she receives disability due to a mental condition." (Ret. Supp. 10) (A-9) According to the report, Ms. Proctor had been disabled for two years. (A-9)

In addition to this information, which was in the court's file in the pending criminal case, the Respondent had the statements of defense counsel that Ms. Proctor had started taking "her medication," and the medication had "improved her ability to effectively assist Defense Counsel." (Ret. Supp. 20) (A-12) The "improvement" in Ms. Proctor's ability to assist defense counsel was the reason offered by counsel for holding a hearing on Respondent's May 3rd order for a

mental examination. (Ret. Supp. 20) (A-12) Respondent could have read the motion for a hearing as stating that in the past there had been problems communicating with Ms. Proctor.

In addition to this documented material that was available to Respondent, the trial judge had the ability to personally observe Ms. Proctor in court. (See L.F. 2) There can be no dispute under Missouri law that Respondent may rely on his own observations in determining whether a mental examination should be ordered. ***State v. Moon***, 602 S.W.2d 828, 835 (Mo. App. W.D. 1980) (reversing *sua sponte* for plain error the failure of the trial judge to order a mental examination and declaring trial counsel ineffective on direct appeal) Relator apparently does not dispute that Respondent had the opportunity to observe her in court but instead argues that the observation was for an insufficient amount of time or that the trial judge did not question Relator. This argument that the observation must be for a specific period of time with communication between the trial judge and the defendant has no support in the statute or the law.

Relator now argues that Respondent abused his discretion because he did not hold a hearing of the type contemplated by Relator and repeatedly argues that as counsel she does not believe that Relator needs an examination. Similar statements were made by trial counsel in ***Woods v. State***, 994 S.W.2d 32, 39 (Mo. App. W.D.1999). In the hearing on the post-conviction motion, trial counsel testified that she "felt" that the defendant "understood what was happening" and "[w]as okay now." *Id*. In reversing the sentence imposed by the trial court without an examination, the appellate court succinctly concluded that a

determination of whether defendant was "okay" "was not counsel's call." *Id*. By the plain language of the statute, the obligation to ensure that a defendant is

mentally competent to proceed is shared by the trial judge, the prosecutor, and the defense. ***State v. Tilden***, 988 S.W.2d 568, 574 (Mo. App. W.D. 1999), quoted with approval in ***Woods v. State***, *supra* at 37.

Clearly there is no "quantum of evidence" required for a court to order a 552 examination. None of the cases cited by Relator hold that the trial court does not have discretion in determining whether to order an examination. The language relied on by Relator in her brief is focused on the inquiry of whether the trial judge erred in NOT ordering an examination. Relator relies on the Court's discussion in ***Woods v. State***, 994 S.W. 2d 32 (Mo. App. W.D. 1999) and ***State v. Clemons***, 946 S.W. 2d 206, 222 (Mo. banc 1997) to argue that "reasonable cause" had not been established. In **Woods**, the appellate court was discussing whether trial counsel or the trial court erred in not requesting a mental examination of defendant prior to sentencing two months after the guilty plea. The appellate court reversed and remanded with the directive for a mental examination of the defendant before sentencing. *Id*. at 39. In **State v. Clemons**, 926 S.W. 2d 206 (Mo. banc 1997) this court was discussing whether the trial erred in NOT granting defendant's motion requesting funds for mental experts. This court concluded that the trial court had not erred because defendant Clemons' claims of learning disabilities and ADHD were not "so consequential as to become a significant factor." *Id*. at 223.

Based on the documented evidence and the ability of the trial judge to observe the Relator's demeanor, there was evidence to support the trial judge's order. To deprive the Respondent of the ability to exercise discretion, which was based on his observations and the material before him, by the issuance of an extraordinary writ violates the appellate court's admonishment twenty-five years ago in ***State ex. rel. Vaughn v. Morgett***, *supra*. In explaining its ruling on the extraordinary writ, the appellate court noted that "{an appellate} court has no right or authority to dictate how {the judge} shall exercise his discretion" to determine if reasonable cause exists to believe Relator has a mental disease or defect. *Id*. at 437-438 .

Because Respondent acted properly in the exercise of his discretion, the preliminary writ should be quashed.

II. **Respondent Bryson's order of a mental examination under Chapter 552 was not an exercise of "extra-jurisdictional power," because a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect she was incapable of knowing and appreciating the nature, quality, or wrongfulness of her conduct (Section 552.030, RSMo and Section 562.086, RSMo), in that to be guilty of the crime of Harassment Ms. Proctor had to have had the purpose to frighten the victim when she communicated to the victim the threat to assault him.**

Relator argues that the scope of the examination ordered by Respondent is too broad because she has never pleaded not guilty by reason of mental disease or defect during her court appearances, hereinafter a plea of NGRI. Relator apparently argues that if "reasonable cause" to order the examination exists, then this Court should issue an extraordinary writ to edit the Respondent's order. Realtor cites no authority for the proposition that an extraordinary writ will issue to craft the wording of the order. Relying on general maxims of statutory

construction, Relator maintains that she is entitled to the issuance of the writ of prohibition.

Respondent agrees that Section 552.020.3, describes the findings necessary for inclusion in the mental examiner's report (A-14). Subsection 4 of Section

552.020 (A-15), then addresses additional information that must be included in the report if the defendant had pleaded lack of responsibility due to mental disease or defect or if the defendant has given notice pursuant to Section 562.030.2. Respondent, however, finds no support in the statute, or in the case law, for Relator's conclusion that Section 552.020 subsections 3 and 4, specifically prohibit the inquiry into the Relator's mental status at the time of the alleged criminal events without Relator's pleading not guilty by reason of mental disease or defect. (Relator's Brief at 21). Moreover, Relator's contention that the statute limits Respondent's ability to order a mental examination is contrary to federal cases that hold that a court has a "solemn obligation" to order a psychiatric evaluation of criminal responsibility in a case where it is "obvious" that the trial will "revolve" around the issue of the defendant's mental state at the time of the crime, regardless of specific statutory authority. See e.g., ***United States v. Whitlock***, 663 F.2d 1094, 1106 (D.C. Cir. 1980) citing ***Winn v. United States***, 270 F.2d 326, 328 (D.C. Cir. 1959).

Neither statutory section relied on by Relator addresses what the court **MAY** do to comply with the statutory dictates that a "person with the required

mental state is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is criminally responsible."[4] (Emphasis added.) Section 562.086, (A-24). Also, Section 552.030.1 (A-19) provides that "a person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person's conduct." Consequently, the statutes vest the trial court with discretion to order an examination for an evaluation of the mental state of the defendant at the time of the crime in addition to a competency examination. See also, ***State ex rel. Westfall v. Crandall,*** 610 S.W.2d 45 (Mo. App. E.D. 1981) (discussing the burden on the state if the defendant interjects a special negative defense of diminished mental capacity); ***Wilkins v. Delo***, 886 F.Supp.1503, 1508, 1512-1513 (W.D.Mo. 1995) (granting habeas corpus relief because Wilkins could not knowingly and intelligently waive his right to counsel under the Sixth Amendment because of his mental illness although his trial counsel had not requested a mental examination during the initial competency proceedings.) (History omitted)

Respondent recognizes that there is a presumption of competency that allows the court to make a fact-finding determination that a mental examination is not required. Also, the cost of the examination must be paid by the state under Section 552.080, (A-22); and consequently, financial realities will limit the state's request for a mental examination under Chapter 552. But, if the trial court makes

[4] For an explanation of the historical development of the statutes and the requirements imposed by statute in addition to the discovery rules, see ***State v. Simonton***, 49 S.W.3d 766, 776 (Mo. App. W.D. 2001)

a factual determination that there is a question about the defendant's competency to proceed, it is permissible for the court to order the mental health expert to include a determination of whether the accused suffered from a mental disease or

defect at the time of the crime. If not, the interests of justice are served only by the defense attorney and not by the prosecutor or the court.

The statutory enactment of a mandated duty if the defendant pleads NGRI should not be read to preclude the court from doing justice. The federal courts have recognized that they have the "inherent authority" to order a psychiatric evaluation directed at the question of criminal responsibility where the main issue at trial will be the defendant's mental state at the time of the crime. *See e.g.* ***United States v. Reifsteck***, 535 F.2d 1030, 1033 (8th Cir. 1976); ***United States v. Whitlock,*** *supra*.

Moreover, if the defendant is not competent to proceed, and was not competent at the time of the offense to appreciate the wrongfulness of the acts, this determination should be made by the mental health care expert, if possible, at the time of the first examination. For example, in the recent case of ***State v. Wolf***, WD60277, decided October 29, 2002, by the Court of Appeals, Western District, the state filed a motion pursuant to Section 552.020 (competence) and Section 552.030 (diminished capacity at the time of the crime) four (4) days after the felony complaint was filed. Before he was certified to the circuit court, defendant Wolf had undergone two psychological examinations in the juvenile court. Slip opinion at 3. The circuit court ordered the examination. *Id*.

The maxim of statutory construction that requires the interpretation of a word to be based on the "whole" statute mandates that Relator's reliance on the maxim of the "plain language" of the legislation be rejected. *See*, ***J.B. Vending Co. v. Director of Revenue***, 54 S.W.3d 183, 187-188 (Mo. banc 2001); ***In re Graven***, 936 F.2d 378 (8th Cir. 1991). Relator would have this Court interpret Chapter 552 so that the use of the term "shall" in interpreting the requirements of the examiner's report defeats the interest of justice and constitutional protections. As this court recently noted, "all canons of statutory construction are subordinate to the requirement that the Court ascertain and apply the statute in a manner consistent with that legislative intent." ***Budding v. SSM Heathcare System***, 19 S.W.3d 678, 682 (Mo. banc 2000).

In addition to arguing that the "plain meaning" of "shall" trumps the requirement of interpreting together Section 552.020 with Section 552.030 and Section 562.086, Relator must be arguing that Respondent's act in ordering a mental examination was an act based on an exercise of "extra jurisdictional" power. Simply alleging that PART of the mental examination is "outside the scope" of the statute should not entitle Relator to a writ of prohibition. Relator never explains how the inclusion in the order to a reference of her mental state at the time of the crime invalidates the entire order allowing Respondent to determine if Relator is fit to proceed as directed by the statute and the applicable

constitutional principles. The preliminary writ of prohibition should be quashed because Relator has not demonstrated how Respondent acted outside of his jurisdiction under Chapter 552.

III. **Respondent Bryson's order does not cause "irreparable harm" to Ms. Proctor, because any statements made by Ms. Proctor during an examination under Chapter 552 are not admissible against her on the issue of guilt, in that Section 552.020.14, RSMo mandates that such statements be excluded and case law, based on the statute and the Constitution, recognizes the inadmissibility of such statements**

By arguing that the justification for the issuance an extraordinary writ is protection of Relator's rights against self-incrimination, the Relator ignores specific statutory directive and applicable case law. Section 552.020.14 (A-17), specifically provides that any statement made by the accused in the course of ***any*** examination (emphasis added), or any information obtained, may not be admitted at trial on the issue of guilt. Relator's argument of "irreparable harm" ignores this statutory directive.

Moreover, the Missouri Supreme Court has specifically ruled that the limitation on the admission of statements or information is applicable to an examination under Section 552.020 or Section 552.030. See, MAI-CR 3d 306.04 and ***State v. Strubberg***, 616 S.W.2d 809 (Mo. banc 1981). See also, ***Estelle v. Smith***, 451 U.S.454 (1981) (holding that the Fifth Amendment privilege against self-incrimination may be implicated by a psychiatric examination but stating in

dicta that Fifth Amendment rights may not be implicated if the psychiatrist's testimony is limited to questions of competency); ***Penry v. Johnson***, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (discussing ***Estelle v. Smith***, *supra*, and holding that admission of psychiatric report during the penalty phase of a trial, which report was based on psychiatrist's examination of defendant prior to trial on an unrelated rape charge, did not warrant habeas relief) (history omitted); ***United States v. Hinckley,*** 525 F.Supp. 1342, 1347 (DC 1981) (rejecting defendant's argument that the examination was limited by the terms of the statute to a determination of competency) (history omitted).

Consequently, it is clear that no statements obtained in the course of the examination may be used against the Relator on the issue of guilt. Relator does not explain how she will suffer "irreparable harm" if any statements made to the mental health expert during the examination are excluded from evidence on the issue of guilt. Speculation about statements being used to impeach Relator -- if she were found competent to stand trial, and if the state could prove that she had the purpose to harass the victim, and if she testified at trial - does not qualify to meet the standard of "irreparable harm" necessary for the issuance of an extraordinary writ of prohibition.

Furthermore, any statements made by the state at the time of sentencing with regard to a recommendation for punishment after a determination of guilt could not harm Relator. At this stage of the proceedings, the issue of guilt would have been determined and the jury would have been excused. The request for a

writ of prohibition on this allegation of "irreparable harm" is nothing more than a request to have this court substitute its judgment for Respondent's determination,

after his opportunity to observe Ms. Proctor and review the documents, that an examination was necessary.

Although Relator offers no authority for her conclusion that Respondent's order violates her right to privacy, she argues, "if Relator's thoughts were allowed to be mined in the way Respondent urges, it would certainly be a *Brave New World*." (Relator's Brief at 24.) Respondent disputes this characterization, which Relator attaches to an order authorized by statute, especially since Relator "does not contest" the state's authority to request a mental examination under Chapter 552. (Relator's Brief at 22).

Without citation to authority and based on speculation, Relator has not established any possibility of "irreparable harm" to her. The extraordinary writ should not issue to deprive Respondent of the discretion to act under Chapter 552. If Relator's argument is accepted, it would be impossible for a court to order a mental examination to determine if a defendant were competent to stand trial because every such examination would be able to be challenged under the right to privacy banner and Fifth Amendment. Certainly, there is no support in federal or state law that prohibits the trial court from inquiring into the competency of a defendant to stand trial based on general assertions involving protecting a defendant's thoughts.

The preliminary writ of prohibition should be quashed because Relator has not established the basis for her claim of "irreparable harm."

CONCLUSION

For the above stated reasons, Respondent respectively requests that the preliminary writ of prohibition be quashed by this Court.

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CERTIFICATE OF SERVICE

The undersigned certified that the above and foregoing was served hand delivery this 13th day of November, 2002 to:

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The Honorable Larry Bryson
Associate Circuit Court Judge
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RESPONDENT

_____
Deborah Daniels
ATTORNEY FOR RESPONDENT

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b).

The undersigned certifies that in accordance with Mo.R.Civ.P. 84.06(c), the foregoing appellate brief complies with the word count limitations contained in Mo.R.Civ.P. 84.06(b). In particular, Relator's brief contains 7,027 words, based upon a word count generated by Microsoft Word, the word processing program used by Respondent to compile the instant brief. Pursuant to Mo.R.Civ.P 84.06(g), the attached disk has been scanned for viruses and is virus free.

_____
Deborah Daniels
ATTORNEY FOR RESPONDENT